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Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument

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INAUGURAL HOWARD LICHTENSTEIN LECTURE IN LEGAL ETHICS: LAWYER PROFESSIONALISM AS A MORAL ARGUMENT

Thomas L. Shaffer*

The recurrent movement to call or recall lawyers to professionalism is a moral argument. It is an argument made to individual lawyers, a claim among lawyers, that *professionalism* has to do with being a good person. I propose to discuss that claim with you today, and in doing so to salute, in a modest way, the generosity of the late Mr. Lichtenstein's law firm (Proskauer, Rose, Goetz, and Mendelsohn) to your university.¹

I also hope to salute my friend and colleague in legal ethics, your Lichtenstein Professor, Monroe H. Freedman. I can hardly think of a moral issue among lawyers, during my thirty years in the profession, that Professor Freedman has not enriched because he paid attention to it. His attention to moral questions has been peculiarly important for us because he, more than anyone else in the field, refuses to be hoodwinked by pretension or humbugged by phrases.² He is always clear-sighted and never destructive; he addresses our critical moral worries with learned clarity, with energy, and with good will. He makes the profession better by being in it. I am honored to be invited to Hofstra to inaugurate a lecture series that will, I trust, flourish as one of the benefits to Hofstra of Monroe Freedman's Howard Lichtenstein Professorship.

I see two aspects to the claim that professionalism is a moral value: one aspect says to a person "be professional." It is an admonition to virtue.³ The

*Professor Shaffer is the Robert and Marion Short Professor of Law at the University of Notre Dame. Professor Shaffer presented this speech at Hofstra University's Inaugural Howard Lichtenstein Lecture in Legal Ethics, October 31, 1989.

1. Mr. Lichtenstein was a partner in the law firm and a prominent labor lawyer and community leader. He graduated from New York University in 1929, *cum laude*, and from its law school in 1932. He was a friend and supporter of the new law school at Hofstra University.

2. See Temple, *Monroe Freedman and Legal Ethics: A Prophet in His Own Time*, 13 J. LEGAL PROF. 233 (1988). This article lists most of Professor Freedman's major publications.

3. On a spectrum of specificity in admonitions to virtue, "be professional" is in the middle. It has broader moral force than pointing to a good habit, such as "be brave," or "be compassionate"; "be professional" seems more like invoking a way of life. But it is more specific than what is sometimes called the first principle in ethics (do good and avoid evil),

other aspect says to a person, "be in the profession—be *of* it," with an appeal that seems familiar from other admonitions we have heard to align ourselves with groups⁴ that are supposed to make us better persons: Join the youth group at the temple, or at the church; be a Scout; if you want to meet nice people don't go to bars.⁵ Let's look at these two aspects of professionalism one at a time.

I. BE PROFESSIONAL

Is it the case that to be professional is a way for a lawyer to be a good person?⁶ The most prominent support for an affirmative answer to that question, at the moment, is the professionalism campaign of the American Bar Association. This campaign started in 1984, when Chief Justice Warren Burger said he thought the Bar in the United States was "moving away from the principles of professionalism."⁷ He recommended that the Association

since it refers to one's work; it is narrower than "be a good boy," which is what my grandmother said to me every morning, regardless of what I had done or was planning to do. See G. MEILAENDER, *THE THEORY AND PRACTICE OF VIRTUE* (1984); A. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* ch. 7 (1988).

4. This second aspect of "be professional" depends on the possibility that there are groups that can make us better persons. In the Aristotelian tradition that possibility rests on the virtue of friendship. See G. MEILAENDER, *FRIENDSHIP: A STUDY IN THEOLOGICAL ETHICS* (1981); Cooper, *Aristotle on the Forms of Friendship*, 30 *REV. OF METAPHYSICS* 619 (1977); Cooper, *Friendship and the Good in Aristotle*, 86 *PHIL. REV.* 290 (1977); A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* ch. 14 (1981); T. SHAFFER, *FAITH AND THE PROFESSIONS* chs. 5 and 6 (1987).

5. Looking at "be professional" in these two ways excludes a third aspect of the recurrent movement for lawyer professionalism, an aspect that speaks to a group of lawyers, that says to them collectively, "be a profession." I am going to leave that aspect aside. It is interesting for ethics because it is profoundly susceptible to collective self-deception. See H. FINGARETTE, *SELF-DECEPTION* (1960); S. HAUSER, *TRUTHFULNESS AND TRAGEDY* ch. 5 (1977). Another ethical issue that is consequent on a group being a profession is whether the moral teachings it formulates weaken more general moral teachings in the culture. See MacIntyre, *Does Applied Ethics Rest on a Mistake?*, 67 *THE MONIST* 498 (1984).

6. At this point in a discourse of this sort, someone usually wants to know what I mean when I write about being a "good person." I suppose that a good person is one who seeks to perfect his human abilities and so to flourish. This is the Greek idea of goodness in a person; it is earthy and practical: It says that if you (try to) perfect your abilities, you will be happy. In the Hebraic (Jewish and Christian) religious tradition we say that a human ability is perfected when it functions according to the purposes for which God made it. That may be different from the Greek idea, but it is not, in my Catholic moral tradition, inconsistent with it. See A. MACINTYRE, *supra* note 3, ch. 10.

7. 112 F.R.D. 243, 248 (1986).

study the matter, which it did. A Commission of the Association responded two years later, in a report that was published in the *Federal Rules Decisions*.⁸ The title of the report was in part borrowed from Dean Roscoe Pound and in part taken from a garden of hybrid metaphors the A.B.A. keeps for its committees. The first part of the title is "In the Spirit of Public Service." That is Dean Pound's part. The second part is "A Blueprint for the Rekindling of Lawyer Professionalism." That's from the garden. (It leaves you wondering whether you are supposed to start the fire with the blueprint.)

The report initiated a broader "study" that has become a single-minded campaign. Lawyer professionalism has a national office, a logo, its own journal (called *The Professional Lawyer*), and a budget. I suppose it has, or soon will have, a motto, a constitution, and a mascot. If you are a lawyer and you haven't heard about the A.B.A. campaign for professionalism, you probably haven't heard about *The Maine*, Plymouth Rock, or the Golden Rule.

The appeal to "principles of professionalism," first by the Chief Justice, then by the writers of the 1986 Report, and finally by the broader apparatus the A.B.A. puts behind its campaigns, is a more specific moral appeal than it seems to be. The claim that to be professional is to be a good person depends here on a particular, unmentioned, remembered image of what a good person in the legal profession is. The professionalism campaign is a nostalgic appeal to a particular kind of moral leadership, a particular kind of prominence and power, to the memory we have of the lawyer titans who ruled America, and whose hold on power began, a generation ago, to slip away.

Let me see if I can demonstrate what I mean, first, in ethical theory. The Report talks about virtue. It uses virtue words to describe its moral ideal for lawyers—words such as honor, fidelity, trust, honesty, patriotism,

8. See Morris, Jr., *Chairman's Message: Some Thoughts on Professionalism*, 41 BUS. LAW., Aug. 1986, at xv (for expansion, commentary, and obedience); Mengis, *Professional Responsibility*, 49 LA. L. REV. 487 (1988); Pearson, *The Guiding Restraint of the Professional Spirit*, 24 GONZ. L. REV. 203 (1988-89); Hostetler, *Professionalism on Video*, A.B.A. J., Nov. 1989, at 138; *Meaning of Professionalism*, PROF. LAW., Summer 1989, at 16; Miller, *Self-Regulation: The Essence of Professionalism*, RES GESTAE, July 1989, at 5; R.I. Bar Assoc., *A Lawyer's Creed of Professionalism*, R.I. B.J., Oct. 1989, at 5; Stanley, *Professionalism and Commercialism*, 50 MONT. L. R. 1 (1989); Wash. St. Bar Assoc., *Report by the W.S.B.A. Task Force on Professionalism*, WASH. ST. BAR NEWS, March 1989, at 9; White, *Professionalism and the Law School*, 19 CUMB. L. R. 309 (1989). See also sources cited *infra* notes 27, 39, and 44.

selflessness, integrity, fairness, independence, courage, and devotion. *Virtue words*, as distinguished from *principle words*, speak about moral qualities. Aristotle and his teachers and his students taught morals by describing the virtues they noticed in admirable people. So do the Scouts, as in the Scout Law: "A Scout is loyal, friendly, trustworthy, clean," etc.⁹

The virtues are good habits. Modern virtue writers¹⁰ call them dispositions or characteristics—the latter word suggesting that they are the constituents of good character. This way of looking at our moral lives is focused on being good, rather than being right.¹¹ Principle words, by contrast, speak of things that should be done, right and wrong actions that must be chosen; of moral dilemmas; and of rival courses of action in particular situations. Virtue words focus on persons more than on actions; on good habits rather than quandaries and choices.¹²

9. The grandfather and founder of American legal ethics, the eccentric Baltimore lawyer David Hoffman (1784-1854), also followed this procedure. Hoffman, *Resolutions on Professional Deportment*, reprinted in T. SHAFFER, AMERICAN LEGAL ETHICS ch. 2 (1985). I organized his resolutions into a conventional list of moral virtues: justice, civility [tolerance], prudence, courage, and fraternity [friendship].

10. A. MACINTYRE, *supra* notes 3 and 4; S. HAUERWAS, CHARACTER AND THE CHRISTIAN LIFE: A STUDY IN THEOLOGICAL ETHICS (1975); J. MCCLENDON, BIOGRAPHY AS THEOLOGY (1974).

11. Philip Rhinelander, an academic moral philosopher, said, in a talk to a conference of journalists at Stanford, in 1978:

When we make ethical judgments about persons we generally use terms like *good* and *bad* in the sense of virtuous or vicious. When speaking of acts or behaviour, we generally use terms like *right* or *wrong* in the sense of praiseworthy or blameworthy The great classical writers considered that character was fundamental. Consequently they stressed the importance of developing virtues, or dispositions of character, such as courage, wisdom, temperance and the like. For them rules about particular kinds of conduct were secondary and derivative. By contrast, a legalistic approach to ethics begins with rules about particular kinds of conduct and makes virtues secondary. The first approach . . . puts more weight upon the judgment of the individual. It emphasizes the need for practice and training, because acquiring virtue is like acquiring any other skill [T]he ultimate standard is the model of the virtuous person: what he or she would do is the test of what is right.

See T. SHAFFER, *supra* note 9, at 70.

12. See Shaffer, *The Legal Ethics of Belonging*, 49 OHIO ST. L.J. 703 (1988) (attempts to describe a legal ethics of character and to then relate character to the communities from which lawyers come). This is a project in legal ethics that builds on arguments made in my book entitled FAITH AND THE PROFESSIONS and is continued in my book entitled AMERICAN LAWYERS AND THEIR COMMUNITIES (1991). See also Shaffer,

Virtue words are particular. In the ethical classics these words are defined with reference to particular persons in particular cultures at particular times and places. In Aristotle, for example, on the *man of practical wisdom* in fifth century (B.C.E.) Athens;¹³ in American Jewish culture on the *menssch* among the late immigrants;¹⁴ in Italian-American culture on the American *paesano* of the period before America closed its doors to Italians;¹⁵ and, among British and American lawyers, on the nineteenth-century gentleman.¹⁶ I think the A.B.A.'s unidentified ideal, when it speaks of professionalism with virtue words, and when it claims that to be professional is to be a good person, is the American gentleman-lawyer. The virtues the A.B.A. describes are virtues we know, because we know lawyers who have those virtues. We might say—and a generation ago we would have said—that we know what these lawyer virtues are because we know lawyers who are *gentlemen*.

To speak in this way of the virtues in an occupation is to say that the worthy practice of that occupation requires moral training—what the medieval Scholastics called formation: The practice of the profession is a moral art. Being a professional means being formed to act morally, being formed in certain habits. You learn these moral habits as you learn your craft; you learn them from elders in your calling. Moral skills and craft skills infiltrate one another, so that it is not possible to separate moral skills from skills that have to do with the craft. You perfect your practice of one kind of skill as you perfect your practice of the other, with companions in your calling.¹⁷

Virtues, then, are both like and distinguishable from skills in craftsmanship. They are something you learn and perfect as you grow, more than they are something you choose. The moral masters from whom we learn and with whom we perfect these virtues, in the A.B.A.'s unidentified model, are the lawyers, judges, professors, and deans whose portraits hang on the inside walls of our law buildings and in the hallways of our law offices. The

Lawyers as Assimilators and Preservers, 58 MISS. L.J. 405 (1988).

13. A. MACINTYRE, *supra* note 3, chs. 6, 7, and 8.

14. A reference I owe to Professor Freedman.

15. Shaffer & Shaffer, *Character and Community: Rispetto as a Virtue Among Italian-American Lawyers*, 64 NOTRE DAME L. REV. 838 (1989).

16. Shaffer, *The Gentlemen in Professional Ethics*, 10 QUEENS L.J. 1 (1984).

17. S. HAUERWAS, *supra* note 5; Shaffer, *On Being a Professional Elder*, 62 NOTRE DAME L. REV. 624 (1987).

A.B.A.'s professionalism campaign thus does not rest on a theory. It does not rest on an argument. It rests on a memory and on a person.

The A.B.A. campaign would be more insightful and more persuasive if it were to admit the dependence. The reason you don't see the campaign identifying the person it remembers is that to admit to the potency of such a memory would be to recognize that lawyer professionalism is at odds with the popular American value of equality. The gentleman's ethic, in and out of the legal profession, has always implied that gentlemen are superior people. The A.B.A. campaign, if it were to admit that what it is pushing is the old-fashioned, American lawyer-gentleman's ethic, would find itself involved in a latter-day defense of elitism—of a superiority the gentleman-lawyer has always taken for granted.

The Commission instead focused its virtue language on the "integrity" of the good lawyer.¹⁸ We know what integrity means in the life of a good lawyer (the Report does not have to define it for us), because we know good lawyers—parents, relatives, neighbors, elders in our religious congregations, and the lawyer-heroes of our novels and television programs.¹⁹ Older, *integrated* professional people are familiar in our culture; invoking them in this way is a natural thing to do, and it does not at first raise an issue about superiority. To say that a person has integrity does not seem to imply a class distinction.

But to say that the particular integrity of the good lawyer is his *professionalism*—to tie integrity to professionalism—does imply a class distinction: A *candid* appeal to such particularized integrity would involve, I think, an appeal to the ideal of the American gentleman-lawyer, and that would identify a class distinction. The gentleman-lawyer is a substantive figure in our culture. The A.B.A. can invoke him—and, in my view, it does—but it cannot fashion him to its own purposes; it cannot deny him his assumption of superiority or hide his assumption of superiority behind the word integrity.²⁰

18. Integrity means wholeness, being integrated, together, solid, purposeful, not arrogant but still sure of yourself—sure enough to proceed, anyway. See S. LETWIN, *THE GENTLEMAN IN TROLLOPE: INDIVIDUALITY AND THE MORAL CONDUCT* ch. 5 (1982); C. G. JUNG, *THE PSYCHOLOGY OF THE TRANSFERENCE* 103-04 (R.F.C. Hill trans. Bolligen ed. 1969); C. G. JUNG, *ANALYTICAL PSYCHOLOGY* 137-38 (1968).

19. T. SHAFFER, *supra* note 4, ch. 1.

20. Integrity and superiority are not inconsistent. The nineteenth century gentleman's

Consider Southern gentleman-lawyers in our modern fiction, lawyers such as Atticus Finch of *To Kill a Mockingbird*, or William Faulkner's Gavin Stevens. The culture these novels describe depends on such people; they are responsible for everything. They are a ruling class. Alexis de Tocqueville called them the only American aristocrats.²¹

Consider the solid senior lawyers of Louis Auchincloss' New York City, big-firm lawyer stories or of James Gould Cozzens's stories of lawyers in small-town Pennsylvania or lawyers in the nineteenth century Yankee stories of William Dean Howells. These lawyers are the architects of their societies.²²

And, most telling of all in terms of the *current* marketability of what I believe to be the Report's allusion to the gentleman-lawyer, consider the wise elders who have been for thirty-five years the pillars of television stories about lawyers: Lawrence Preston of *The Defenders*, Andy Griffith as Matlock, the elder lawyer who presided over *The Young Lawyers*, Leland McKenzie of *L.A. Law*.²³ These elders are the teachers and carriers of the

ideal claimed *both*, as in General Robert E. Lee's famous definition:

The forbearing use of power does not only form a touchstone, but the manner in which an individual enjoys certain advantages over others is a test of a true gentleman.

The power which the strong have over the weak, the employer over the employed, the educated over the unlettered, the experienced over the confiding, even the clever over the silly—the forbearing or inoffensive use of all this power or authority, or a total abstinence from it when the case admits it, will show the gentleman in a plain light. The gentleman does not needlessly and unnecessarily remind an offender of a wrong he may have committed against him. He can not only forgive, he can forget; and he strives for that nobleness of self and mildness of character which impart sufficient strength to let the past be but the past. A true man of honor feels humbled himself when he cannot help humbling others.

D. FREEMAN, ROBERT E. LEE 499 (1935).

21. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835). The relevant passage is excerpted in T. SHAFFER, *supra* note 9, at 100-01.

22. They use the law to make their communities work. Perhaps they are not so much aristocrats as they are technocrats. Auchincloss has, however, portrayed them as favoring the imagery of art and avoiding technological imagery. See L. AUCHINCLOSS, *THE GREAT WORLD AND TIMOTHY COLT* (1956); see also T. SHAFFER, *supra* note 9, chs. 6 and 7.

23. What I am thinking about with regard to Mr. McKenzie is the way he trains the young lawyers in his firm in moral skills (the virtues, good habits) as he trains them in legal craftsmanship. In this he is like Dr. Mark Craig of "St. Elsewhere" or Captain Furillo of

skills of lawyering, as Holmes would have said, in the grand manner, they are personifications of the claim that moral skill and craftsmanship are inseparable.

I suspect that most of the members of the A.B.A. Commission would admit that they yearn for the return of the gentleman-lawyer. But the Commission could not admit the yearning, and there are good reasons why it did not. The most obvious reason is that the profession is on its way to being half women, and speaking of women as gentlemen is problematic. It is even problematic to use that word for men who are not white Protestants. Atticus Finch and Gavin Stevens and Howells' and Auchincloss' Yankee lawyers are all male, all white, all Protestants, all from upper middle-class families and they all accept that it is in the natural order of things for lawyers to come only from such backgrounds.

Suppose, nonetheless, that the A.B.A. campaign were to pause, reflect, and admit its dependence on the image, notion, and tradition that these stories and shared experiences describe for Americans, and especially for Americans who are lawyers. Suppose these campaigners were to derive from those reflections a gentleman-lawyer's ethic, to call *that* ethic professionalism, and to put it up for discussion. The A.B.A. probably won't do that—for the reasons I mentioned—but I would like to do it (and have done it²⁴) anyway.

What I find is that the ethic of the American gentleman-lawyer is like Lincoln's Second Inaugural. It is a beautiful and melancholy thing. Not useful for slogans, sermons, and videotapes from Chicago, but still useful for thinking about the morals of lawyers and the tragic dimensions of turning professionalism into a moral argument.

The gentleman-lawyer is melancholy because he is responsible for the way things are. He is implicated in injustice. He is, as the old civil rights movement used to say it, part of the problem. What makes him somber, rather than merely guilty, is this: He knows that he knows. He is the sort of leader C. P. Snow's professor-character, Roy Calvert, said he wanted as the

"Hill Street Blues." All three professional elders teach through example as well as instruction; none are paragons, but all three take responsibility for what is happening around them—which is to say that each of them has moments when he finds that he has to forgive himself in order to get along. Cf. Machlowitz, *Lawyers on TV*, 74 A.B.A. J., Nov. 1988, at 52. See Rosen, *Ethical Soap: "L.A. Law" and the Privileging of Character*, 43 U. MIAMI L. REV. 1229 (1989).

24. Shaffer, *supra* note 16.

master of his college: A person who has to forgive himself in order to get along. The gentleman-lawyer is able to function in a moral universe because he admits his complicity in the evil that is around him, the evil that supports his power and the power of his clients.

This is the lesson the children in *To Kill a Mockingbird* learned as they waited outside the courthouse where Tom Robinson was being condemned: Atticus Finch is a champion against injustice, a gentleman-lawyer, an aristocrat, and a governor in a racist society—as Howells' lawyers have integrity and are governors in a society that exploits the late immigrants, and Cozzens's lawyers sustain small-town Pennsylvania and are anti-semitic. The awareness of complicity is the sadness, and often the bitterness, in Auchincloss' lawyers. Gentleman-lawyers in New York City are responsible for, and profit from, the unmerited privilege, the discrimination, the oppression of the poor, that is around them.²⁵ They have to get up and go on in order to be lawyers. They have to forgive themselves to get along.²⁶

When the Illinois State Bar Association held a public and published discussion of the 1986 report on professionalism, a member of the A.B.A. Board of Governors accused the Commission of being too hard on lawyers. She said lawyers should praise themselves. She implied that a principal purpose of the campaign²⁷ for professionalism should be to raise self-esteem

25. Brown, Kaufman, & Hildebrandt, *Has the Rise of Megafirms Endangered Professionalism?*, 75 A.B.A. J., Dec. 1989, at 38.

26. The literary contrast is the lawyer who *quits* being a lawyer. I think of Howells' troubled Puritan lawyer in *A Modern Instance* who leaves the law and becomes a minister; and of scores of young lawyers I know who, from an array of religious traditions, but usually for religious reasons, renounce litigation and work in a peacemaking practice that is lived at the fringes of lawyer professionalism. These lawyers and ex-lawyers raise a different moral issue than the one I mean to identify by talking about the melancholy lawyer-gentleman. They raise the issue of when to exit from an unjust society. The gentleman-lawyer does not raise that issue; his ethic is an ethic that denies the possibility of exit. He sees injustice more clearly than others in his time and place, and he works to redress injustice more resolutely than they do, but *he cannot leave*. That is the lesson Faulkner's Gavin Stevens gives to his nephew Chick in *Intruder in the Dust* and Atticus Finch gives to his son (but not so much to his daughter) in Harper Lee's *To Kill a Mockingbird*. The gentleman-lawyer's ethic depends on the moral adequacy of the community he cannot leave and, for this reason among others, his ethic is inadequate—a "sub-cult" of the sustaining communities described as Israel and the People of God, by our Hebraic theology. See Shaffer, *supra* notes 16 and 17.

27. Rotunda, *Professionals, Pragmatists, or Predators*, 75 ILL. B.J. 420, 421 (1987) (quoting Martha W. Barnett).

among lawyers. She may even have been arguing that the allusion to the gentleman-lawyer is a mistake; that would be the ethical implication in an argument for praising lawyers: If praising lawyers is what professionalism means, the A.B.A. would do better to avoid Leland McKenzie and allude instead to the less sententious television lawyers who function at a distance from the evil that is around them. A campaign to praise lawyers requires television characters who get by on righteous indignation, modern literary lawyers (not often called gentlemen) who claim to be the victims of oppression rather than the custodians of it. (I mean Grace Van Owen, Victor Sifuentes, and Michael Kuzak—rather than Leland McKenzie.) The campaign for professionalism would then describe lawyers as part of the solution, rather than as part of the problem.

To accept the praise-lawyer's suggestion on professionalism would be to avoid the gentleman, *and* to be incoherent in the use of professionalism as a moral word. Invoking the gentleman-lawyer is, by contrast, a coherent, interesting, serious, tradition-based, vital way to make the argument, "be professional." The issue for the A.B.A. campaigners is whether they are serious about it. Do they understand they are talking about a serious but somber ethic? I see a couple of indications that the A.B.A. does *not* know that.

(1) The Commission's report lays prominence on lawyers who are legislators or who work in legislatures: "[L]awyers should put aside self-interest and should support legislation that is in the public interest."²⁸ That principle is an old one among American gentlemen-lawyers; the grandfather of American legal ethics, David Hoffman, taught his law students that a gentleman-lawyer should not advocate any legal change that is not good for the country.²⁹

But the A.B.A. makes an exception that Hoffman refused to make: Lawyers *representing clients* may advocate legislation that is not good for the country; in that case, the report says, "[t]he legislature is presumed to be able to discern the public interest."³⁰ Somewhere between Hoffman's day (he

28. 112 F.R.D. 243, 264 (1986).

29. Hoffman, *supra* note 9, Resolution XIV: "[S]hould the principle . . . be wholly at variance with sound law, it would be dishonourable folly in me to endeavor to incorporate it into the jurisprudence of the country. . . ."

30. 112 F.R.D. 243 (1986). See also Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988).

died in 1854) and our own, professionalism stopped meaning that lawyers are responsible for justice. My point is not to endorse either position on the principle, it is rather, to say that either way you take the principle—whether you say that lawyers should advocate client interests only if those interests are good for the country, or that lawyers should advocate client interests with loyalty and leave the good of the country to others—living the principle honestly is a melancholy business. It is like what Shirley Letwin noticed, in her study of the gentleman-hero in Trollope's novels. The gentleman may lie to protect his friend, she said, but he will not pretend that he has not lied.³¹ The gentleman-lawyer may forsake the common good in order to serve his client, but he will not pretend that his doing so serves the common good.

(2) The A.B.A. campaign contrasts professionalism and commercialism. An ethic of profit, which the Report implies is an acceptable ethic in business, is not acceptable in a profession.³² That is an odd argument; if it is truthful, it is an ethic of complicity or a piece of one.

"Commercialism" is the source and cause of professional opulence, and the A.B.A. endorses opulence. It accepts the principle that lawyers should be paid well so that they can live well. But living well means that lawyers are paid from the profits of commercialism. The campaign disapproves of the commercial lawyer and excuses the lawyer who is paid from commercial profits. Those who practice commercialism do not act in a spirit of public service; those who are paid from commercialism to practice law do.

I may be too harsh. Maybe that distinction can be made to work. I have not been able to work it out in a way that does not make lawyers an elite corps of wealth transferors (and that way of working it out seems not worth the trouble).³³ It seems to me more truthful and more hopeful—and the A.B.A. Report mentions the possibility³⁴—to notice that clients who practice commercialism *are* concerned with the common good, and that lawyers who

31. S. LETWIN, *supra* note 18, at 72.

32. 112 F.R.D. 243, 251 (1986). *See also* Stanley, *supra* note 8.

33. *See* A. MACINTYRE, *supra* note 4. MacIntyre makes a distinction between "practices" and "institutions." Certain manifestations of the profession, as the A.B.A. talks of it, may be practices—associations that form their members in the skills of craft and of virtue. Institutions often corrupt practices, but institutions also support practices (as, say, hospitals support local medical practices or universities support practices of teaching and scholarship). In these terms, "commercialism" could perhaps be the institution and commercial lawyers the practice.

34. 112 F.R.D. 243, 280 (1986).

serve commercial interests serve the common good by serving the interest their clients have in the common good. That is, though, an ethic of complicity, and if you take it up you should be prepared (as the gentleman-lawyer is) to follow it where it leads.

Another way to think about commercialism is to notice that the ethic of the gentleman-lawyer is ironic:³⁵ I think of a cartoon I saw once, framed and hanging on the wall in the office of the chief executive officer of a manufacturing company. It showed a huge pipe dumping foul fluid from a factory into a river. A businessman from the factory and two people from the government were looking at the pipe. The businessman said, "Thank you for bringing this to my attention." The cartoon would work as well if the speaker had been the factory's lawyer.

(3) The argument against commercialism is odd also in seeming to say that the Horatio Alger virtues that are celebrated in the American entrepreneurial myth—taking risks, seizing opportunities, "exploiting the moment" (as we learn from the *Dead Poets Society*)—are vices in the practice of law. Competition, the Commission implied, is good in business but demoralizing in the practice of law.

The gentleman-lawyer would not agree; he finds it possible, as the gentleman in business does (I think of Howells's Silas Latham), to be an entrepreneur, a competitor, and a gentleman. The A.B.A. Commission tends to neglect our professional history, while rather stridently insisting that law students should be forced not to neglect it.³⁶ If the Commission were to grapple with our history, it would reflect more usefully on the professionalism that is in commerce and the commerce that is in professionalism. It would then, perhaps, be less smug.³⁷ It would then have been in a position to ponder how to fit the altruism of pure service to the commercialism that supports living well.

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35. R. NIEBUHR, *The Ironic Element in the American Situation*, in *THE IRONY OF AMERICAN HISTORY* 1-16 (1962).

36. 112 F.R.D. 243, 266 (1986).

37. The Commission notices that "some lawyers," due to pressures created by high salaries and demands for "billable hours" to pay them, "engage in questionable practices, including charging two different clients for the same period of time." *Id.* at 260. A commercial non-lawyer might say she could find no *question* in such practices. She might use the word theft to describe them, though.

I conclude, on this first aspect of the issue of lawyer professionalism, that it can make sense to admonish a lawyer to "be professional." The deepest part of the argument is an ethic of character, an argument for the virtues, and an argument that seems to be made in dependence on the persisting image and spirit of the American gentleman-lawyer. The argument has possibilities, but you cannot get very far with them until you begin to appreciate the dark side of the enterprise.

II. BE IN THE PROFESSION

The other aspect of the personal morals of professionalism is the admonition, "be in (of) the profession." This argument says that being in the profession will make you a better person. If you are like other law students I have known since I started living among law students, more than thirty years ago, this admonition goes against the grain. You don't think the legal profession will make you a better person. When you pay attention to your recent moral drift, you are probably afraid the profession will make you worse. You are on guard against its seductions and corruptions. You are suspicious of the legal profession.³⁸

Before this argument is going to get anywhere—I can hear you saying—you are going to have to know what this "profession" is that will perfect your character. Is it the American Bar Association? No; I don't think so. With very local or bucolic exceptions it is probably not any bar association.³⁹

The gentleman-lawyer in American stories has not been much of a joiner: Atticus Finch read for the Bar in an office, and he practiced alone.

38. T. SHAFFER & R. REDMOUNT, *LAWYERS, LAW STUDENTS, AND PEOPLE* 35-58 (1977).

39. My argument for excluding bar associations is empirical: These associations have functioned usefully as trade unions, and sometimes as rallying points for lawyers' concern about inequality and inefficiency, but I have not noticed evidence to justify the admonition that belonging to them will make me a good person. I do not think the A.B.A. campaign argues that, and I'm sure the American gentleman-lawyer would not. This is not to condemn bar associations, but is to say they are mostly among the "institutions" which support "practices," as universities are institutions that support practices among scholars and teachers. See A. MACINTYRE, *supra* note 4 (describing "institutions" which support "practices"). See also Rotunda, *The Word "Profession" is Only a Label—and Not a Very Useful One*, *LEARNING AND THE LAW* 16 (1977); Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 *LOY. U. CHI. L.J.* 1149 (1987).

The only evident collaboration in his professional life is with the sheriff—and that is a collaboration in government. The only organization his daughter mentions his being a member of is the Methodist Church, which includes lawyers but is not limited to them.

If Gavin Stevens ever attended a bar association meeting, Faulkner did not notice. His moral associations were in his family and with a sewing machine salesman.⁴⁰

The association which has moral force in Auchincloss' lawyer stories is the law firm, but Auchincloss' firms corrupt more than they ennoble.⁴¹

These stories do not suggest substance for the admonition to be in and of the profession, because they make it hard to get hold of what "profession" means. But the stories show how there might be a possibility for moral gain in professional collegueship, in that they show moral gain in *other* associations: the church, the family, the old boys standing around in front of the courthouse. Students—some students anyway—know about a professional instance of that sort of moral gain from their associations in law school. I want to take the associations our lawyer-heroes have in their families, religious congregations, and communities, and add to them the associations law students have with one another, and from those two oblique sources suggest a meaning for "profession" that might be useful.

Friendship is at the heart of the sort of association I want to describe here. The good qualities in my friend, and in me, are what attract us to one another. We support one another in many ways, including the support we give one another in becoming better people. We know that is so because we

40. Friends in Oxford tell me that the association Faulkner describes in the Snopes novels, between Stevens and V.K. Ratliff, the sewing machine salesman, is based on Faulkner's friendship with the Oxford lawyer Phil Stone. (Faulkner dedicated *The Town*, his novel in which Ratliff is prominent, to Mr. Stone.) This may suggest that association with lawyers may not be necessary for a lawyer, but association with at least one lawyer may be ethically useful, if not necessary, for other citizens. See Stone, *The Man and the Land*, in WILLIAM FAULKNER OF OXFORD (1965).

41. See Shaffer, *supra* note 9, at 386-87 (for a summary of contemporary critical commentary). See also Shaffer, *Henry Knox and the Moral Theology of Law Firms*, 38 WASH. & LEE L. REV. 347 (1981). There is a stronger sense of professional collegueship in British trial-lawyer stories, not excluding Mortimer's Horace Rumpole stories. That suggests an interesting comparison for professionalism in American law-firm stories, since, although barristers share offices, they are not allowed to practice as firms—they are not allowed to meet the world outside *collectively*.

have been friends and we have made friends.⁴² Now, add to friendship the fact that, in the law-school relationships I am thinking of, we are *working* together on something that is important and hard to do. (My guess is that the occasions that will come to your mind are study in groups, moot-court briefs, practice-court-trial teams, team research projects, and working together on clinical cases or on law-review essays.) What you now have is a friendship, a moral association, that is substantively professional.⁴³ Is it the case that being in that sort of friendship makes you a better person? I am willing to guess that the answer is yes.

Law firms often begin in one of these ways, and to the extent they survive as professional friendship, law firms, or parts of them, form and reform like this. Law faculties, and law departments in government and business, or parts of them, are often professional friendships. More than half of the lawyers in America practice by themselves; they appear to form professional friendships in office-sharing arrangements, in small-community courthouse society, and even in local bar associations. These illustrations suggest substance for the idea of moral collegueship among lawyers, a substantive "profession" for the admonition to "be in the profession." (My illustrations are not evidence. The life each of us leads with her or his friends is where the evidence is.)

If you are with me so far, though, notice a few things about this professional friendship. An important part of the payoff from being in it, as Professor Freedman says,⁴⁴ is not money or advancement or status. Some

42. T. SHAFFER, *supra* note 4, ch. 5.

43. It may spill over into social and familial collegueship, it may even begin there, but in the phase of it that I mean to notice it is a friendship in professional work. See Shaffer, *Collaboration in Studying Law*, 25 J. LEGAL EDUC. 239 (1973); see also T. SHAFFER & R. REDMOUNT, *supra* note 38, ch. 9. Not that I want to exclude the relatively more social version of this: The old saw says lawyers are great people to drink with, but that's not true. There are lawyers who are great people and do not drink. What is true is that some of my friends are great people to drink with and lawyers as well; and some of my friends are just lawyers. Are they my friends *because* they are lawyers? Yes, I may never have thought of it that way before, but that is the case. We would not be friends if we were not both (all) lawyers and, when I think about it, most of what we share as friends is "law stuff." We share our work. We share our love for our work. We share what makes lawyering fun.

44. Professor Freedman wrote:

In a free society that emphasizes individual dignity, personal autonomy, due process of law, and equal protection of the laws, professionalism means that a

of its rewards are interpersonal, but not interpersonal in a way that can be separated from the craftsmanship of what we do together. This is a colleagueship with reference to tasks, to work, and to service for pay, but an important part of the good it provides us is, as Alasdair MacIntyre says, *internal*.⁴⁵

Broader hierarchical organizations do not provide professional friendship. They support it and they seem often to frustrate and corrupt it. The way law schools are built tends to turn them into bus stations, but it could tend to turn them into places for friendships in learning and teaching law. Some law firms encourage creative teamwork, others make it unlikely. My guess is that bar associations do more to encourage professional friendship when they appoint committees to reform the probate code than when they sponsor golf outings or invite university professors to talk to their members in hotel ballrooms. I think in this regard of Mr. Lichtenstein, both of his work in labor-law committees of the Bar, and of his service to the Jewish community in New York City.

The professional friendship I am talking about is always to a significant extent a collaboration in skill. We become better at our craft because we work together—we “extend” ourselves in our craft; we come closer to understanding and accepting inherited standards of excellence in its practice. Standards have authority among us—we come to agree about that—and we recognize that our standards have come to us from our traditions and from our teachers. Standards do not have authority *because* we accept them, but we accept the authority they have. MacIntyre often uses examples from sport: “If, on starting to play baseball, I do not accept that others know better than

lawyer (1) helps members of the public to be aware of their legal rights and of the availability of legal services to achieve those rights; (2) advises each client fully and candidly regarding the client's legal rights and moral obligations as the lawyer sees them; and (3) zealously and competently uses all lawful means to protect and advance the client's interests as the clients sees them after thorough counseling. (4) The fact that a lawyer is earning a living by serving as a lawyer is not material to whether the lawyer is acting in a professional manner.

Letter from Monroe H. Freedman to Thomas L. Shaffer (Aug. 9, 1989). This threshold framework is developed in M. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* (1990).

45. A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 190-91 (2d ed. 1984). Internal goods are goods specific to a practice. “[T]hey can only be identified and recognized by the experience of participating in the practice . . .” *Id.* at 188-89. The good they provide is a common good. *Id.* at 190. See also *infra* note 47 and accompanying text.

I when to throw a fast ball and when not, I will never learn to appreciate good pitching let alone to pitch.”⁴⁶ This is true of interviewing clients, of distinguishing cases, and of cross-examining expert witnesses.

The gains each of us makes in skill, in the skills of the craft as well as in moral skill (virtue), are possessed by each of us without being taken away from the rest of us. (Think of the moral and literary growth of the boys in the Dead Poets Society.) It is characteristic of these gains “that in their achievement is a good for the whole community who participate in the practice.”⁴⁷

These gains depend on and support good habits among the professional friends. When we work together on something important, we learn to be honest with one another, we learn to be fair to one another, and we learn to act with clarity and purpose. These good habits—disciplines—virtues—are *also* skills we learn in the practice. The virtue words for these good habits are *truthfulness, justice, and courage*.

I suggest that this is a way to make ethics out of the word profession. To be in and of a profession, so defined, is a way to become a good person. These practices are occupational extensions of friendship and, like friendship itself, they are collaborations in the good. Friends make one another better.⁴⁸ Each of these friendships in work *is* a profession. Maybe they can be carefully linked together, and can then be, for specific, temporary, and limited purposes, a collected profession. Maybe bar associations are capable of providing occasions for the temporary gathering. If the A.B.A. campaign seeks this meaning for lawyer professionalism, and seeks this sort of professionalism for lawyers, its campaign makes sense. But its arguments for its claim—alas—do not make sense, and it is—alas—necessary to flay away at some of the A.B.A. arguments, in order to see how arguments for such a claim might make sense.

(1) *The method of persuasion*. Socrates said to Thrasymachus, we will not *define* justice; we will instead show what justice is by the way we treat one another as we talk together, about justice.⁴⁹ The A.B.A. campaign aims

46. *Id.* at 190.

47. *Id.* at 190-91.

48. Aristotle, in what was perhaps a rare burst of hyperbole, said that friends share more than justice, and so they have no need of justice.

49. “[I]f we proceed in our enquiry as we lately did, by making admissions to one

to persuade law students to be in and of the profession. How might one go about the task of persuasion, given that the way one goes about it will show what the profession is and why a law student should want to be in it? Professionalism as professional friendship would say that the first thing to do is to *listen*. Socrates would say that seriousness in making a moral claim means that you listen to what is said about the claim by those on whom the claim is made. The A.B.A. would listen especially to the young who are among those it is trying to form and persuade—because their minds still work well, because we elders are trying to teach them to think, and they will not learn to think if their teachers do not show respect for what they are thinking, and because they are somewhat less likely than we are to buy into the profession's settled self-deceptions. (The young have self-deceptions of their own.)

From this Socratic point of view, the A.B.A. Report is a dismal piece of attempted persuasion. Its section on training in professionalism in law school proposes that law teachers *instill* the "principles of professionalism" in law students. The Report calls for examinations and investigations, and for forcing law students to watch videotapes in which "experienced lawyers" discuss moral issues in a "Socratic" fashion.⁵⁰

Socrates would be appalled. *None* of that is education. None of it is "professional." None of it is ethics. Ethics is talking together about morals. Socrates did not set his students down and make them listen to him; he asked questions and listened to them. This has been the way of ethics from Abraham and Moses to Aristotle and Cicero, from Jesus and the Rabbis of the Talmud to Professor Monroe Freedman. Especially Professor Monroe Freedman, who understands and teaches, better than anyone who works in legal ethics, that ethics does not *instill* principles. Ethics *questions* principles.⁵¹ God made us to serve Him, as Bolt's Thomas More said, "in the tangle of the mind." The first step in any serious claim about professionalism as a moral value would be to subject the notion of professionalism to the most irreverent law students the Commission could find. Not the ones who seek office in the Law Student Division, but the ones who would not be caught dead at a bar-association meeting. What the A.B.A.

another, we shall unite the offices of judge and advocate in our own persons." *The Republic, Book I*, in *THE DIALOGUES OF PLATO* 613 (I. B. Jowett trans. 1937).

50. 112 F.R.D. 243, 267 (1986).

51. Freedman, *Two Fables*, A.B.A. J., May 1, 1988, at 57.

shows in its recipe for legal education in professionalism is that it is afraid of its children.

The Commission's approach to practicing lawyers is more plausible as education and as ethics. The Report encourages "retreats" for law firms and truth-discovering discussion within law firms and among lawyers from different firms.⁵² It invokes, as to practitioners but not as to students, the virtue of friendship. Socrates, if he were in town, might even go to one of these retreats. I don't think he would darken the door of the ideal A.B.A. law school.⁵³

(2) *The issue of lawyer income.* All of the world seems prepared to admit that lawyers are becoming unavailable for ordinary people, and that the reason for this is that lawyers cost too much. I am surprised that no one who worries about this situation has thought to compare us to the clergy. The clergy are still available to ordinary people, they aspire as much as lawyers do to be professionals, and they aspire to have a profession. But they don't cost as much as we do. The clergy, alone among the traditional professions in America, seems to have come upon the moral equivalent of money. You can tell it by looking at the old cars they drive, the cheap vacations they take, and the fact that they send their children to public colleges.

The professionalism campaign would gain credibility if it would talk truthfully about the moral equivalent of money in the terms such a comparison might lead to—about the material life of lawyers. Instead, the Commission talks of the acquisition of *wealth*. Lawyers, the Report says, "should. . . resist the temptation to make the acquisition of wealth a primary goal of law practice."⁵⁴ The chairman of the Commission said, "[t]o substitute for high professional competence and dedication the amassing of wealth is fundamentally wrong."⁵⁵ This defines the question of income in such a way that almost everybody gets off the hook—from the seven-figure partner in the big law firm, to the six-figure law teachers who scoff at such opulence, to the second-year student who wonders about her high five-figure start in one of those firms.

52. 112 F.R.D. 243, 272 (1986).

53. T. SHAFFER, *supra* note 4, ch. 6 (exploring that possibility, as to Socrates in the habit of an Irish monk).

54. 112 F.R.D. 243, 300 (1986).

55. Stanley, *supra* note 8.

We lawyers don't want to amass wealth, the Report says; wealth is the furthest thing from our minds. Lawyers, as Daniel Webster said, live well, but they die poor. Students who pant for those seductive Wall Street starting salaries think of them as a way to pay back loans while they live as well as Ann Kelsey and Victor Sifuentes do. They do not want to get rich. Partners who complain about associates' salaries are not amassing wealth; they are living well.⁵⁶

We don't have to consult the clergy, if you would rather not. A Commission of lawyers from other countries—Canada, Britain, West Germany, Italy—would have got this issue right. Those lawyers are still in the middle class. They live more like American clergy than like American lawyers. They would say to their American colleagues, "You live *too* well. That's why you cannot help ordinary people. The acquisition of wealth is not the problem. This 'living well' you talk about is the problem. The issue for professionalism is whether your profession can deal with the corruption that 'living well' brings to the possibility of being a profession, to the possibilities of professional friendship and a 'spirit of public service.' You seem to value comfort more than the virtue of craftsmanship or the craftsmanship of virtue. You have lawyers in America whose earnings are modest, but, in your talk of professionalism, you imply that they are failures. You speak of service but

56. The Wall Street partners I know make a lot of money, but they do not live well. They work ninety hours a week so that somebody else can live well. My colleague Walter F. Pratt, Jr., pointed out that fear of the corrosive effects of "commercialism" was prominent in the early formation of the American republican vision. He advises: "The consensus seemed to be that no government over such a large area could succeed without a virtuous people. But there was disagreement about how to preserve that virtue, with some arguing that only those who owned sufficient property could be virtuous, since they depended on no one else for income. Those property owners were distinguished from merchants (those in 'commerce') who could not be virtuous because they depended upon others for their income. In that light, commercialism was seen as a vice which threatened the very existence of the nation." See also Banning, *Some Second Thoughts on Virtue and the Course of Revolutionary Thinking*, in CONCEPTUAL CHANGE AND THE CONSTITUTION 194 (1988); Pangle, *Federalists and the Idea of 'Virtue,'* in THE CONSTITUTION, (Winter 1984). Republican political theory and virtue as the basis of legal ethics were associated in David Hoffman's doctrine. See *supra* note 9. Hoffman was both the first of the legal ethicists and a passionate Whig. See Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673 (1979). What may be hopeful here, for modern thinking about legal ethics, is that, while these early republicans argued about the best way to preserve virtue, they seem to have agreed on what virtue is and on its importance.

you accept material aspirations that impair the possibility of service.”⁵⁷

III. CONCLUSION

Does it make sense to admonish an American lawyer to “be professional”? Yes, it makes sense. Being professional is a way to be and to become a good person. But none of us can explore any seriously proposed avenue to goodness without first being truthful about what is going on around us. And the truth is that morally serious professionalism brings us face to face with the tragic character of professional life.⁵⁸

Does it make sense to admonish an American lawyer to “be in and of a profession”? Yes; that, too, makes sense, because we become better people when we flourish among friends. We become better people and craftsmen as well—*good* lawyers—in moral friendship with other lawyers. There are sober moments there, too, of course; the collegueship would not be moral if there weren’t. One of these may be when colleagues look at one another and say, “What are we up to?” and when they then listen to the answers of their friends.⁵⁹

57. My friend, Stanley Hauerwas, after reading an early draft of this essay, wrote, with regard to lawyer income:

[Y]our point about lawyers and wealth . . . might be spelled out a bit more in terms of MacIntyre’s understanding of the relationship between practice and institutions necessary to support the practice. . . . [T]he institutions might well pervert the practice in a way that makes it well nigh impossible to appreciate the continued viability of the practice itself. . . . [T]hat would be a way of spelling out that issue without it being seen as just an attack on making money.

See *supra* note 33.

58. There is more to this point than the instance of it I have discussed here—the ethic of complicity among gentlemen-lawyers. See Shaffer, *The Professional Ethics of Individualism and Tragedy in Martin Arrowsmith’s Expedition to St. Hubert*, 54 MO. L. REV. 259 (1989).

59. I am grateful for the advice of Harlan R. Beckley, Roger C. Cramton, Monroe H. Freedman, Jimmy Gurule, Stanley Hauerwas, Walter F. Pratt, Jr., Robert E. Rodes, Jr., Jack L. Sammons, Andrew P. Shaffer, Edward L. Shaffer, Mary M. Shaffer, Nancy J. Shaffer, and Francis D. Shaffer of the Tacoma, Washington Bar.

